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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

NO. 269

ELIZABETH ROSPIGLIOSI,

Petitioner,

vs.

DUDLEY J. CLOGHER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND SUPPORTING BRIEF

MILTON M. FERRELL
1023 duPont Building
Miami, Florida
Attorney for Petitioner

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered after rehearing on May 31, 1950, affirming the judgment of the Circuit Court of the Eleventh Judicial Circuit

of Florida, in and for Dade County, Florida, which last mentioned judgment was entered on April 25, 1950.

SUMMARY STATEMENT OF MATTER INVOLVED

A. Statement of the case.

Review is sought of affirmance by the Supreme Court of the State of Florida of a money judgment against petitioner based on a contract of petitioner to share profits with respondent, a registered employee of a member of the New York Stock Exchange (Florida Supreme Court Opinion Tr. 69), which profits were made from the stock account of petitioner with said member of said Exchange. Under said contract petitioner was to furnish the money and the respondent the experience. (Florida Supreme Court Opinion Tr. 68). The respondent, at the time, was the manager of the Miami Florida Office of Bache & Co., said member of said Exchange. The contract was a direct violation on the part of the respondent of a rule of the New York Stock Exchange prohibiting him from making the same. (Rule quoted below in full—also Tr. 76). The said Circuit Court of Dade County, Florida entered said judgment on April 25, 1950, (Tr. 56), and the portion of same complained of granted a money judgment against petitioner on said contract in the sum of $18,700.00, with interest thereon at 6% per annum from October 1, 1945, making an aggregate of approximately $24,700.00. (Tr. 58). The Supreme Court of the State of Florida by its Mandate entered on May 31, 1950, affirmed said Circuit Court judgment. (Mandate Tr. 74).

It was the contention of petitioner before the Supreme Court of Florida and the Court rendering the judgment

that said contract was void under the Securities Exchange Act of 1934, 15 U.S.C.A. 78a et seq. The Supreme Court of Florida in its opinion (Tr. 68) held that said Act did not apply, and the applicable portion of said opinion is quoted hereinafter.

B. Rule of the New York Stock Exchange Violated.

The rule of the New York Stock Exchange violated by the respondent in contracting with the petitioner to share profits in her stock account (Tr. 76) reads as follows, to-wit:

> "5. Interests in Customers' Accounts. No registered employee shall, directly or indirectly, take or receive a share in the profits of any customer's account, or share in any losses sustained in any such account."

C. United States Statute Involved.

The United States statute making void the contract upon which the judgment sought to be reviewed was based is 15 U.S.C.A. 78cc, and that portion of it applicable reads as follows, to-wit:

> "VALIDITY OF CONTRACTS.
>
> "(a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

"(b) Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation."

D. Opinion of Supreme Court of State of Florida.

The opinion of the Supreme Court of the State of Florida is reported at 46 So. (2d) 170, (Also Tr. 68) and that portion of said opinion applicable to the question as to whether or not the said contract was void under the United States statute reads as follows, to-wit:

"The appellant insists that the judgment was improperly entered because the partnership was invalid from its inception, having been formed in contravention of a rule of the New York Stock Exchange that no registered employee of a mem-

ber of the exchange could have an interest in a customer's account. Parenthetically, the appellee was an employee of the firm through which he and the appellant traded.

"The appellant, citing us 15 U.S.C.A. 78e et seq., indulges in the following reasoning: Under 15 U.S.C.A. 78e no exchange may do business without registering with the Securities and Exchange Commission; one condition for registration is that the exchange shall furnish the commission copies of its rules— 15 U.S.C.A. 78f; no registration will be granted—15 U.S.C.A. 78f (b) —"unless the rules of the exchange include provision for the * * * disciplining of a member for conduct * * * inconsistent with just and equitable principles of trade, and **declare that the wilful violation of any provisions of this chapter or any rule or regulation thereunder** shall be considered conduct" of such character; under a following section—78f (d)—if it appears to the commission that the applicant is so organized as "to be able to comply with the provisions of this chapter and the **rules and regulations thereunder**" and that its rules are adequate to insure fair dealing, it may be registered; the agreement between the appellant and the appellee was void because of a later section—15 U.S.C.A. 78cc (a) —that any stipulation "binding any person to waive compliance with any provision of this chapter or of any **rule or regulation thereunder**, or of any rule of an exchange **required thereby** shall be void"; under paragraph (b), a contract in violation of "any provision of this chapter or of

any **rule or regulation thereunder,** and every contract * * * the performance of which involves the violation of * * * **any provision of this chapter or any rule or regulation thereunder,** shall be void." (Emphasis supplied.)

"In short, insists appellant, no exchange can operate until it is authorized by the Securities and Exchange Commission, and to secure that authorization it must present rules designed to insure fair dealing, and, to quote appellant's brief, "to protect investors." To continue, a rule of the New York Stock Exchange prohibits an employee from being interested in a customer's account, so the appellee, an employee of the broker, having been interested in the account of a customer, his supposed wife, the above statute was violated and the contract was therefore void.

"Taking the sections of the Federal statutes we have quoted in their order, without referring to them particularly, and tracing the effect of them as it is plain to us, we agree, of course, that no exchange may operate without the sanction of the Securities and Exchange Commission, and to obtain that privilege it must submit copies of the rules under which its transactions are to be governed. These rules must contain provisions for the disciplining of members for conduct that is not consistent with just and equitable principles of trade, and they must declare positively that the wilful violation of any provision of the chapter—that is, 15 U.S.C.A. 78—or rule or regulation under that chapter shall be considered

conduct of such character. But that does not mean that any rule or regulation which the exchange considers necessary to insure fair dealing automatically becomes a rule under the statute, the violation of which would amount to a transgression of that law. It simply means that the exchange **may** have as many rules as it considers necessary to just operation, but it **must** have one that a person guilty of conduct denounced in or under the act as inconsistent with fair dealing will be disciplined.

"The provision of the act anent any contract made in violation of any rule "thereunder" and the performance of any contract amounting to the violation of a rule "thereunder" refers distinctly to rules under the chapter and not to rules of an exchange which have been approved by the Securities and Exchange Commission. We are unable to agree with appellant that the rule of the New York Stock Exchange that an employee may not have an interest in a customer's account has such force and dignity that violation of it would be a transgression of the Federal statutes, even though the rule, we must assume, was approved by the Securities and Exchange Commission. If there is any such regulation under the provisions of the act with reference to an employee's interest in a customer's dealings, no one has cited it.

"The appellant further insists that the whole contract between the parties was invalid because it constituted a waiver by the appellant of her

protection under the rule of an exchange we have already quoted, although she contends "the statute says such a waiver * * * was void." We cannot agree with that position either. This statute —15 U.S.C.A. 78cc (a)—to quote it again, provides that any "stipulation * * * **binding** any person to waive compliance with any provision of this chapter or of any **rule or regulation thereunder,** or of any rule of an exchange **required thereby** shall be void." In the first place, we have discovered nothing in the record, the contract notwithstanding, to show that there was any stipulation "binding" the appellant to waive any compliance; and, in the second place, the waiver would have to affect a rule under the act itself or a rule of an exchange required by the act, neither of which has been shown under the facts presented to us. (Emphasis supplied.)

"Lastly, we cannot ignore the statement in the appellant's brief that the purpose of this rule was the protection of herself as a customer. This but emphasizes our thought that she was not bound to make any waiver even if such a waiver applied to a rule under the act or a rule of the exchange required by the act, but she voluntarily entered into a business venture with a man with whom she proposed to carry out the marriage relationship and, contrary to any idea that unfair advantage was taken of her or that she was victimized, she actually benefited by the enterprise and now seeks to retain more than her share of the profits."

BASIS OF JURISDICTION

Jurisdiction is invoked under Title 28 United States Code, Section 1257, which allows review of final judgments to the highest state court by writ of certiorari "where any title, right, privilege or immunity is specifically set up or claimed under * * * statutes of * * * the United States".

The petitioner contends that her contract with respondent upon which the judgment sought to be reviewed was based, was void under 15 U.S.C.A. 78cc applicable portions of which are quoted above. Petitioner has specifically set up and claimed her right under this statute to declare said contract void, and has specifically set up and claimed immunity under the statute from any liability upon said contract. The following United States Supreme Court decisions were cases holding that said court had or would take jurisdiction either where the action required the application or interpretation of a Federal statute, or involved the question as to the applicability of a Federal statute.

Jones National Bank vs. Yates,
240 U. S. 541, 36 S. C. 429, 60 L. E. 788;

A. C. Frost & Co. vs. Couer D'Alene Mines Corp.,
312 U. S. 38, 61 S. C. 414, 85 L E. 500;

Miles v. Illinois Central R. R. Co.,
315 U. S. 698, 62 S. C. 827, 86 L. E. 1129.

QUESTION PRESENTED

Is a contract between a customer of a member of the New York Stock Exchange, who has an account with such

member, and a registered employee of such member, to share the profits of such account, void or unenforceable under 15 U.S.C.A. 78cc of the Securities Exchange Act of 1934, because made in violation of a rule of said exchange prohibiting such a contract ?

This question was first raised by the petitioner before the Special Master appointed by the Circuit Court of Dade County, Florida, and he discussed and decided the same in his report. (Tr. 47). It was then raised by the petitioner before said Circuit Court by exceptions taken to said Master's Report, one of the grounds of which was "that the evidence according to the Master's own findings clearly shows that the partnership contract was void under the Federal laws". (Tr. 53).

This question was raised before the Supreme Court of Florida by assignment of error (Assignment of Error No. 1 — Tr. 64) as follows, to-wit:

> "The Court erred in the final decree appealed from in entering a common law judgment against the defendant for Eighteen Thousand Seven Hundred and No 100 ($18,700.00) Dollars, with interest from October 1, 1945, at the rate of six percent (6%) per annum, in that the partnership contract upon which said judgment was based was void under the Federal Securities and Exchange Act, because said contract was a violation by the plaintiff of a Rule of New York Stock Exchange forbidding the plaintiff to share in the profits or have any interest in the account of the defendant with Bache & Co."

The decision of the Supreme Court of Florida upon the question is quoted hereinabove. (Entire decision Tr. 68).

REASON FOR ALLOWANCE OF WRIT

The Supreme Court of the State of Florida has decided a Federal question of substance not theretofore determined by the United States Supreme Court. (United States Supreme Court Rule 38—5 (a)). The said Federal question has not been decided by any United States Court.

The question involves the effectiveness of rules of every stock exchange in the United States, which are rules of a kind made by Federal law a prerequisite to the registration of an exchange with the Securities and Exchange Commission, and required by law to be approved by said commission prior to such registration, and which are rules passed for the protection of investors trading through exchanges.

The effectiveness of such a rule depends upon whether or not the same can be violated with impunity, which in turn depends upon the applicability of the quoted Federal statute to the violation thereof.

Annexed to this petition and made a part of the same where not repetitious, is a supporting brief.

MILTON M. FERRELL
1023 duPont Building
Miami, Florida
Counsel for Petitioner